

**REMARKS**

The above amendments and following remarks are responsive to the non-final Office Action mailed March 7, 2005. Upon entry of the above amendments, Claims 26, 33, 34, 37, 38 and 40-44 will have been amended, Claim 27 will have been canceled without prejudice or disclaimer, new Claims 47-49 will have been added, and Claims 26, and 28-49 will be pending. No new matter has been introduced. Entry and reconsideration are respectfully requested.

**Response to Rejection under 35 U.S.C. § 101**

Claims 26-46 have been rejected under 35 U.S.C. § 101 on the basis that the claimed invention is directed to non-statutory subject matter. Applicants traverse this rejection.

Claims 26 and 44 have been amended to recite "a breath receiver adapted to be placed in fluid communication with a subject", thereby obviating this rejection.

Accordingly, the rejection under 35 U.S.C. § 101 should be withdrawn.

**Response to Rejection under 35 U.S.C. § 102(e)**

Claims 26, 27, 39-42 and 46 have been rejected under 35 U.S.C. § 102(e) as being unpatentable over US Patent 6,216,023 to Holte et al. (Holte). Applicants traverse this rejection.

Holte describes an apparatus for determining the difference between regional CO<sub>2</sub> partial pressure of a selected body organ of a mammalian subject and a systematic CO<sub>2</sub> partial pressure of the subject. However, Holte does not teach or suggest the use of a corrector unit connected to the breath analyzer, which is operative to provide an indication of the arterial carbon dioxide partial pressure of a subject as recited in Claim 26 amended above. As such, Claim 26, as well

as dependent Claims 27, 39-42, 46, and 47-49, are distinguished over the applied reference of Holte.

Accordingly, the rejection under 35 U.S.C. § 102(e) should be withdrawn.

**Response to Rejection under 35 U.S.C. § 103(a)**

Claims 26-28, 37-42 and 46 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over US Patent 3,927,670 to Turney et al. (Turney) in view of Holte. Claim 33 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Holte, as applied to Claims 26, 27, 39, and 46, and further in view of US Patent 4,463,764 to Anderson, et al. (Anderson). Applicants traverse these rejections.

The Examiner acknowledges that the primary reference of Turney does not teach each feature recited in independent Claim 26, and attempts to rely on the secondary teaching of Holte to remedy the deficiencies of Turney. More specifically, the Examiner has acknowledged that Turney does not disclose “the apparatus providing an indication of the discrepancy between the end tidal carbon dioxide partial pressure and the arterial carbon dioxide partial pressure.” The Examiner urges, inter alia, that Holte provides an indication of the discrepancy between the end tidal partial pressure and the arterial carbon dioxide partial pressure of the subject, citing the Holte disclosure at Column 1, Line 30-42, thereof for support. From here, the Examiner concludes that it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to combine the apparatus of Holte with the apparatus of Turney to provide an early indication or warning of serious physiological conditions in an intensive care unit.

Contrary to the Examiner’s position, Applicants respectfully submit that Turney and Holte, either alone or in combination, do not teach, suggest, or otherwise render obvious, the

invention as recited in Claim 26 and the claims dependent thereon. In addition to the differences pointed out by the Examiner, Turney and Holte, either alone or in combination, provide any specific teaching, suggestion, or motivation that would lead one of ordinary skill in the art, at the time the invention was made, to use a corrector unit connected to the breath analyzer, which is operative to provide an indication of the arterial carbon dioxide partial pressure of a subject, as recited in Claim 26 amended above. As such, Claim 26, as well as dependent Claims 27, 28, 37-42, 46, and 47-49, are distinguished over the applied references of Turney and Holte, either alone or in combination.

The Examiner has also acknowledged that the primary reference of Holte does not teach each feature of the subject matter recited in dependent Claim 33 and attempts to rely on the secondary reference of Anderson to remedy the deficiencies of Holte. Applicants respectfully submit that the references of Holte and Anderson, either alone or in combination, do not teach, suggest, or otherwise render obvious, the subject matter recited in Claim 33. More specifically, neither Holte nor Anderson advance any teaching that would lead one of ordinary skill in the art, at the time the invention was made, to modify Holte in view of Anderson, as advanced by the Examiner. In addition, neither Holte nor Anderson teach or suggest the use of a corrector unit connected to the breath analyzer, which is operative to provide an indication of the arterial carbon dioxide partial pressure of a subject as recited in Claim 26, as amended above, and from which Claim 33 depends. As such, Claim 33 is distinguished over the applied references of Holte and Anderson, either alone or in combination.

Accordingly, the rejections under 35 U.S.C. § 103(a) should be withdrawn.

**Allowable Subject Matter**

The Examiner indicated the allowability of the subject matter in Claims 29-32, 34-36 and 43-45 if rewritten to overcome the rejections under 35 U.S.C. 101, and to include all of the limitations of the base claim and any intervening claims.

Although Applicants agree with the indicated allowability of Claims 29-32, 34-36, and 43-45, Applicants also believe that Claims 26, 33, 37-42, and 46-49 are also allowable over the prior art.

**CONCLUSION**

Applicants respectfully submit that Claims 26, and 28-49 are in condition for allowance and a notice to that effect is earnestly solicited.

**AUTHORIZATIONS:**

The Commissioner is hereby authorized to charge any additional fees which may be required for the timely consideration of this amendment, or credit any overpayment to Deposit Account No. 13-4500, Order No. 4026-4002US1.

Respectfully submitted,

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Date: July 29, 2005

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